No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE (a corporation),

Appellant,

vs.

LOUIS P. LUTFY et ux.,

Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLANT'S CLOSING BRIEF.

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Subject Index

Table of Authorities Cited

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STATEMENT IN REPLY.

Appellees in their preliminary statement infer that appellant went outside the record. It is appellant's belief that its statement of fact and statement of case are correct and any conclusions drawn by it were the correct conclusions from the evidence as shown in the record.

It is significant that appellees claim that appellant represents the appellees as "black market" operators. The use of the words "black market" does not appear in appellant's brief. We are willing to accept,

however, the conclusion drawn by appellees. The Court itself can determine from the record what kind of a market the appellees were using in this particular case.

It is appellant's claim that appellees neither had title nor actual ownership and regardless of the use of the word "title" in the opening brief, we desire it definitely understood that it is appellant's claim that appellees had neither "title" nor "ownership" to the automobile which they attempted to insure with appellant company.

ARGUMENT ON LEGAL QUESTIONS INVOLVED.

I.

APPELLEES NOT THE SOLE OWNERS OF CAR.

Under this heading appellants presented arguments and law to establish that appellees were not the owners of the automobile in question. On pages 2, 3 and 4 of their answering brief, appellees indulge in argument which they state is based upon the record. In that, there is admission that appellees never had a valid certificate of title in their name (Appellees' Answering Brief, page 3). This statement is difficult to reconcile with the statement on page 2 (A.A.B.) to the effect that there is nothing in the record which shows that appellees were not the "sole owners of the automobile". Without repeating the matters set forth on pages 6, 7 and 8 of appellant's opening brief, we respectfully submit that the record does *not* show that the appellees were the sole owners, but that, in

fact, shows that other people claim to own the car at the time the appellees also claim to own it.

In support of their claim that the company is liable, notwithstanding the claim of other parties, appellees cite two cases (page 4, A.A.B.). One is *Savarese v. Hartford Fire Ins. Co.,* 99 N.J.L. 435, 123 Atl. 763, which we refer to as the New Jersey case, and *Barnett v. London Assurance Co.,* 138 Wash. 673, 245 Pac. 3, which we will refer to as the Washington case. The New Jersey case is the earlier of the two. It, in effect, follows the *Norris* case, 123 Atlantic 761, which is also a New Jersey case.

In the New Jersey case, the insured had possession of the car for two years and the policy had been renewed once. At page 764 the Court stated:

> "* * * We think that 'sole ownership' as used in the policy can properly mean nothing more than that no one else is interested in the ownership of the car * * *."

Is that similar to the facts in this case? Appellees had temporary possession of the car for about thirty-nine (39) days. The record, as shown from defendant's Exhibits 2 and 3, definitely shows that other people were claiming an interest in the car and, in fact, others had possession of the car at the time the case went to trial. At page 764, the Court also stated:

> "According to the record, during two years of undisturbed possession of the car by plaintiff, and even at the time of the trial, no one came forward to claim an ownership interest in the automobile."

Clearly, that New Jersey case is not in point in the case at bar.

In the Washington case, the facts were that the automobile was not found, but another automobile with the same number on it was found in the State of Mississippi, but it was definitely shown that that was not the car covered in the insurance policy in question. In other words, in that case no one claimed to be the owner of the car covered by the policy other than the plaintiff, who was the insured. The car itself was not recovered. One of the claims of the company was that its subrogation rights were lost. In commenting on that, at page 4, the Court stated:

> "Its right to subrogation to the rights of the respondent with reference to the car covered by the policy is not, as we view it, in any manner impaired * * *."

We call the Court's attention to a case decided in 1949 in the State of Arkansas entitled *Southern Farmers Mutual Ins. Co. v. Motor Finance Co.,* 222 S.W. (2d) 981. In that case the insurer had insured a car against theft and refused to pay a claim on the ground of lack of ownership. It was definitely established in the case that another insurance company, the Agricultural Ins. Co., had paid one of its insureds under a theft claim for this car and under its subrogation rights had taken the car away from the insured under the policy of the Southern Farmers Mutual Insurance Company. This Arkansas case reviews the *Hessen* case (Iowa), cited and quoted in

our opening brief (A.O.B. page 10) and the *Norris* case, a New Jersey case, and the *Barnett* case referred to as the Washington case. At page 983, the Court states:

> "It is true that the original owner is not a party to this litigation, but there was no occasion for him to intervene and assert his title, for the reason that his insurer, who had paid him the value of the car, asserted title thereto by way of subrogation and took possession of the car, apparently, as has been said, without objection. There was no occasion for the original owner, or the insurer to intervene as the insurer by subrogation has the possession of the car and the right to possession is not called into question. The New Jersey case, which the Washington case followed, is therefore not applicable, because the true owner's title was asserted and is not questioned in this law suit. In the chapter on automobiles, 5 Am. Jur. Sec. 514, Page 794, it is said: 'Automobile insurance policies frequently contain provisions to the effect that the policies shall be void if the interest of the assured is other than that of an unconditional and sole owner. A purchaser of a stolen car does not have sole and unconditional ownership.' "

We call the Court's attention to the fact that the Arkansas case is more nearly in point as far as its facts are concerned than the New Jersey or Washington cases. In this case, the true owners are not asserting their title, inasmuch as the true owners have possession of the car. We point out that in this case appellees knew where the car was at the time of

the trial and if they were the owners of it, they could have recovered it.

Under the circumstances, we feel the Court should follow the rule of the *Hessen* (Iowa) case and the rule of the Arkansas case. We state that instead of the record showing that appellees were the sole owners of the automobile, the record overwhelmingly shows that the appellees are not the sole owners.

In fact, the record is silent as to any documentary evidence of any kind as far as the Lutfys are concerned. There is no document referring to title, there is no receipt for money paid, there is no cancelled check offered in evidence to prove that money was paid, there is no cancelled money order, no document from the Exchange National Bank showing that the lien had been paid by the Lutfys, and no license plates to the Illinois car.

As a matter of fact, the appellees in this case did not even allege in their complaint that they were the owners of the automobile (T.R., pages 2, 3, 4 and 5). Careful reading of Paragraph III (T.R. 4) would indicate a careful wording to avoid the use of the words "owner" or "ownership", and appellees only pleaded that they had been deprived of the possession of the automobile. At page 4 of their answering brief, appellees claim that they are still the owners of the automobile. If that is true, appellees should recover the car and only make a claim against appellant for damages.

We quote from plaintiff's Exhibit A, the policy in question:

"(T.R. page 32): * * * The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or *may* return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value *but there shall be no abandonment to the company.*" (Italics ours.)

What appellees have attempted to do in this case is abandon the automobile to the company. This they cannot do under the terms of the policy. We quote another portion of the policy to definitely establish this fact and call the Court's attention to the fact that the contract must be read as a whole and not clause by clause:

"(T.R. page 29): Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, *on the date the whereabouts of the automobile becomes known to the insured or the company* or on such earlier date as the company makes or tenders settlement for such theft." (Italics ours.)

A reading of this paragraph in the policy definitely shows that the company has the duty of finding the automobile and may, if it so desires, return the automobile, but at least is not charged with the duty of recovering it, particularly where that attempted re-

covery would be doubtful, as in this case. We submit that appellees have failed to carry the burden required of them of proving, by a preponderance of the evidence, that they were the sole owners of the automobile alleged to have been stolen and have failed to prove an insurable interest in the automobile covered in the policy.

II.

APPELLEES MADE MISREPRESENTATIONS OF MATERIAL FACTS.

Under this heading, appellant claims that appellees made misrepresentations of material facts which voided the policy. The answer of appellees is apparently that there is no showing that the facts which were misrepresented were material facts. We are surprised, however, at the statement on page 4 of appellees' answering brief to the effect that there was no showing that the car insured was not a new car and was not a 1947 model. In face of the exhibits in the Transcript of Record, from pages 69 to 89, we are at a loss to understand such a statement. If Mrs. Lutfy claims she bought the automobile covered under the policy from Don E. Jordan, then that should establish, from all the certificates of title and all the applications made therefor without one single change, that the car was a 1946 model and that it was first sold on January 8, 1947. How can a car which was sold on January 8, 1947, which had a mortgage on it of one thousand five hundred seventy-seven and

89/100 dollars ($1,577.89) to the Exchange National Bank, placed thereon sometime in April of 1947, be considered as a new automobile?

In April of 1947, according to defendant's Exhibit 2 (T.R., pages 72-73), Don Jordan applied to the Secretary of State of Illinois to register a lien on this automobile and requested that the certificate of title be mailed to the Exchange National Bank. We submit that the record, without any contradiction, shows the car in question was not a new car in September, 1947, and was not a 1947 model.

Appellees then contend that the State of Arizona has ruled that these points are not material and cite the case of *North British & M. Ins. Co. v. San Francisco Secur. Corp.,* 30 Ariz. 599, 249 Pac. 761. That case merely holds that the insurer therein did not allege nor prove the materiality of those two points. Herein appellant both alleged and proved the materiality.

This Court should take judicial notice of the situation existing in 1947 regarding the market on automobiles, but in case the Court does not desire to do so, we call the Court's attention to the fact that, according to the record (T.R. page 76), Don Jordan paid four thousand eight hundred forty-eight dollars ($4,848.00) for this car when it was brand new in January of 1947. Appellees, nine (9) months later, paid five thousand four hundred twenty dollars ($5,420.00) for this same automobile and were willing to pay five thousand six hundred dollars ($5,-

600.00) for it, indicating that in the used car market, an automobile brought a higher price than a new car, first, because of the scarcity of new cars, and, secondly, because of the ceiling price which had been on new cars for such a long time, thus keeping the price of new cars down.

If this car had been insured as a new car, apparently its value would have been much less and appellant could have paid much less for the loss of the car as a new car than for the loss of it as a used car, as shown by the record itself.

Counsel also makes much of the fact that the record discloses that the lien was paid when the appellees purchased the automobile. (A.A.B. page 5.) If Mrs. Lutfy purchased this automobile in September of 1947, and if the lien was paid at that time, then we must ignore entirely the record (T.R. page 71) which shows that the lien was paid on October 16, 1947. That statement was sworn to before a notary public on the 16th day of October, 1947, in Chicago. (T.R. page 71.)

Appellees also state on page 5 of their answering brief that the original certificate of title issued to Jordan did not carry the statement that there was a lien. Of course, that is true when it was originally issued, but in April of 1947, Jordan applied to have the lien registered (T.R. pages 72-73), and the certificate of title was requested to be mailed to the Exchange National Bank. It is noted that this original bill of sale and certificate of title was surrendered

on April 18, 1947 (T.R. page 76) to the Secretary of State. The one with the lien on it was surrendered on October 24, 1947. (T.R. pages 77-78.) Appellees try to make much of the fact that appellant had information that the mortgage was paid off to the Exchange National Bank (A.A.B. page 5) and appellees refer to Exhibit 1, pages 65 and 66 of the Transcript. All counsel for appellant was trying to do at that point was to ascertain if Mrs. Lutfy had any information about the payment of the mortgage, but that is not evidence that any moneys the Lutfys paid for the payment of the car was to discharge the mortgage. It was merely a statement of counsel and Mrs. Lutfy's answer was that she neither saw evidence of the lien nor did she see Jordan pay any money to the bank. (T.R. page 66.)

Appellees apparently have missed the points as to the misrepresentations, because they claim, in any event, that the policy was not voided because the lien was discharged prior to the time the loss occurred. The point that appellant makes is that there was a misrepresentation at the time the policy was issued in September that there was not a lien on the car. If the Lutfys had told their insurance agent that the car was a new car, and also in the same breath, said that there was a mortgage on it to the Exchange National Bank in the amount of one thousand five hundred seventy-seven and 89/100 dollars ($1,577.89), clearly the insurance company would have been put on notice and would then have exercised its right to inquire and would have then ascertained the true

situation. Failing to disclose those facts placed the company in a position which made it difficult, if not impossible, to exercise clear judgment as to the amount of or the hazard of the risk involved.

III.

APPELLEES CONCEALED MATERIAL FACTS.

Under this heading appellees apparently admit that facts were concealed but only claim that they were not material facts and also that appellant hasn't shown that placing Arizona license plates was in any way illegal or unlawful. Knowing that the Court will take judicial notice of the Arizona Motor Vehicle Act, we hesitate to reply to appellees' argument under Point III. We call the Court's attention to Section 66-211 of the Arizona Annotated Code (which is the Arizona Motor Vehicle Act), which, in substance, provides that the number plates assigned to an automobile shall remain thereon even though the registration and certificate of title is transferred. We also call the Court's attention to Arizona Code Annotated Section No. 66-205, Subsection C, regarding the registration of a foreign vehicle. In that section it is required that the owners of every foreign vehicle which has been registered in another state shall surrender to the Arizona Motor Vehicle Division the number plates assigned to such vehicle, the registration card, certificate of title, certificate of ownership, or other evidence of such foreign registration, together with

satisfactory evidence of ownership, showing that the applicant is the lawful owner or possessor of such vehicle.

How appellees can take the position, in view of the Arizona Motor Vehicle Act, that it wasn't illegal to put plates from one automobile on to an Illinois automobile is beyond our understanding. May we call the Court's attention to the fact that Mrs. Lutfy knew that the automobile had been registered in the State of Illinois. (T.R. pages 56-57.) She also claims that she had the certificate of title in her hand and endorsed the name of herself and her husband on it. (T.R. pages 58-59.) It is difficult to understand why Mrs. Lutfy did not obtain the Illinois license plates for this car, knowing, or claiming to know, that the car had been registered, and claiming to have the certificate of title in her own hands. As we have heretofore pointed out, there is absolutely no documentary evidence in the record showing that the Lutfys had any ownership in this car. If they only had the Illinois license plates, which they should have obtained if they were the bona fide purchasers of any car from the true owner, there would be some tangible evidence of their claim.

IV.

APPELLEES PREJUDICED SUBROGATION RIGHTS.

Under this heading appellant demonstrated that its subrogation rights were useless as far as the Lutfys were concerned and as far as this particular auto-

mobile was concerned. Appellees, in answering this point (A.A.B. pages 6, 7 and 8) merely claim that, first, the appellant was not entitled to any subrogation rights because it did not pay the loss, and, secondly, that appellees were still the owners of the automobile and it was up to appellant to effect a recovery. We respectfully call the Court's attention to the *Barnett* case (Washington) and the Arkansas case (supra), both of which involved the question of subrogation rights. We also call the Court's attention to the policy and the sections thereof regarding subrogation (T.R. page 34), and also regarding the section on no abandonment of the car to the company (supra). Clearly the law will not require the company to do a futile act.

Appellant found the car, and appellant established the record of title of the car, which clearly demonstrated the futility of attempting to recover it as the subrogee of the Lutfys. Appellant would only be in the same position that the Lutfys were in, and in appellant's viewpoint, the Lutfys had no interest in the car and could prove no interest in the car. To attempt to recover the car from Paul Horvath in Miami, Florida (T.R. page 87) would be an idle gesture and would be of no benefit to either the Lutfys or the company.

May we say in closing that the Lutfys, throughout the matter, have shown a lack of willingness to cooperate, as well as an inability to appreciate the position they are in. After not having received the license up to October 11, 1947, instead of getting in touch

with the Motor Vehicle Department of the State of Illinois, Mr. Lutfy wrote a letter to Mr. Marciano, 7925 South Trimble Avenue, Chicago, Illinois, and then stated that he (Marciano) was going to send it to the Motor Vehicle Department to effect the transfer. (T.R. page 47.) Even after October 11, 1947, Lutfy still did not get in touch with the Motor Vehicle Department, but talked to Mr. Marciano over the telephone. (T.R. page 47.) Certainly in a transaction involving over five thousand dollars ($5,000.00), it would seem that appellees would have exercised a little more business acumen and gotten in touch with the Motor Vehicle Department in Springfield, Illinois, or with Mr. Jordan, or with the Motor Sales Company in Chicago. Their failure to do so would indicate another reason why appellant was not willing to advance five thousand four hundred twenty dollars ($5,420.00) in payment of Lutfys' claim in the hope that sometime, somehow, the Lutfys would be able to produce some evidence of ownership which would allow the company to effect a recovery of the car, which, all parties at that stage of the proceedings knew, was in Miami, Florida.

Admittedly, appellant made no demand for documents from the Lutfys, because the Lutfys had no documents to produce, and throughout this entire matter, and even up to the time of the denial of the liability, and clear through this entire trial, no documents have been produced to establish ownership of the car in the Lutfys.

CONCLUSION.

Appellant submits that appellees did not prove their case in the lower Court and have failed to establish any reasons in their answering brief why the judgment should not be reversed.

Dated, San Francisco, California,
May 22, 1950.

Respectfully submitted,
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